

United States

12

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of WEST HILLS MEMORIAL PARK, a corporation, Bankrupt, WM. H. B. SMITH, JR., H. J. SANDBERG, HOWARD-COOPER CORPORATION, SHELL OIL COMPANY, JAMES A. SEWELL, DRAKE LUMBER COMPANY, C. H. MARTIN GEORGE TEUFEL, HOWARD E. GOLDEN, P. E. GOLDEN, L. L. DOUGAN, WARREN H. COOLEY, OREGON SECURITIES COMPANY, CUTLER PRINTING COMPANY and OREGON SIGN & NEON CORPORATION, Appellants,

vs.

THOMAS G. DONLCA,

I, Trustee of the Estate of West Hills Memorial Park, a corporation, Bankrupt, Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon.

FILED

MAR - 5 1942

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of WEST HILLS MEMORIAL PARK, a corporation, Bankrupt, WM. H. B. SMITH, JR., H. J. SANDBERG, HOWARD-COOPER CORPORATION, SHELL OIL COMPANY, JAMES A. SEWELL, DRAKE LUMBER COMPANY, C. H. MARTIN GEORGE TEUFEL, HOWARD E. GOLDEN, P. E. GOLDEN, L. L. DOUGAN, WARREN H. COOLEY, OREGON SECURITIES COMPANY, CUTLER PRINTING COMPANY and OREGON SIGN & NEON CORPORATION, Appellants,

vs.

CLARENCE X. BOLLENBACH, Trustee of the Estate of West Hills Memorial Park, a corporation. Bankrupt, Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF THE
ATTORNEYS OF RECORD

REUBEN G. LENSKE,

Yeon Building,
Portland, Oregon,
for Appellants

MOE M. TONKON,

Public Service Building,
Portland, Oregon,
for Appellee

In the District Court of the United States
For the District of Oregon

No. B 25045

In the Matter of WEST HILLS MEMORIAL
PARK, a corporation,

Bankrupt.

CERTIFICATE OF REFEREE ON PETITION
OF ATTORNEYS FOR CERTAIN CRED-
ITORS FOR A REVIEW OF THE REF-
EREE'S ORDER DECLARING FAILURE
UPON THE PART OF CREDITORS TO
ELECT A TRUSTEE AND APPOINTING
CLARENCE X. BOLLENBACK, TRUSTEE.

To the Honorable James Alger Fee and Claude
McCulloch, Judges of the Above Entitled
Court:

Estes Snedecor, the referee in bankruptcy in
charge of this proceeding, hereby makes his certifi-

cate on the petition of Reuben G. Lenske and Herbert M. Cole, attorneys for certain creditors for a review of the referee's ruling and order made at the first meeting of creditors as follows:

"In the election of a trustee Mr. Ahlgrim voted the largest in amount and Mr. Lenske voted the largest in number, and the referee declared a failure to elect a trustee and appointed Clarence X. Bollenback trustee of the bankrupt's estate and fixed his bond at \$2000.00."

The facts stated in the petition for review are substantially correct, except in the following particulars:

1. At no stage of the proceedings did the referee state that the petitioners had a majority in number and amount of creditors voting. The referee reserved his ruling until all claims had been considered and all creditors with votable claims had been given an opportunity to vote.

2. It is true that the referee's ruling and order [*1] on review was made upon Mr. Herbert Cole's miscalculation of the total amount of claims being voted by Mr. Lenske and himself; but a recheck of claims allowed and voted by the respective groups of creditors reaffirms the correctness of the referee's ruling to the effect that Messrs. Lenske and Cole voted the greater number of claims and Mr. Ahlgrim and his associates voted claims totalling the larger amount.

3. The number and amount of claims voted by each group are as follows:

CLAIMS VOTED BY MESSRS. LENSKE AND
HERBERT M. COLE FOR HERBERT M. COLE
AS TRUSTEE:

1. Cutler Printing Company.....	\$ 193.10
2. Howard E. Golden.....	125.00
3. Wm. H. B. Smith, Jr.....	1,200.00
4. George Teufel	57.50
5. Charles H. Martin.....	996.00
6. L. L. Dougan	100.00
7. P. E. Golden.....	250.00
8. Shell Oil Company.....	128.76
9. Olds, Wortman & King (Oregon Securities Co.)	120.02
10. Drake Lumber Company.....	346.46
11. Howard-Cooper Corporation	327.50
12. James A. Sewell.....	101.75
13. Warren H. Cooley.....	362.75
14. H. J. Sandberg	403.40
15. Oregon Sign & Neon Corp. (missing from file)	473.50
The Oregon Legionnaire.....	17.00
Total.....	<hr/> \$5,202.74

CLAIMS VOTED FOR THE ELECTION OF
CLARENCE X. BOLLENBACH, TRUSTEE:

1. John P. Kavanaugh by R. N. Kavanaugh, Administrator	\$2,500.00
2. Oregon Door Company, by Ahlgrim.....	75.00
3. Enterprise Planing Mill Co., by Ahlgrim.....	163.74
4. Honeyman Hardware Company, by Ahlgrim.....	157.04
5. The J. K. Gill Company, by Ahlgrim.....	76.55
6. Oregon Brass Works, by Ahlgrim.....	726.20
7. Credit Service Company, by Ahlgrim.....	889.96
8. Beasley & Stoehr, by Sidney Graham.....	393.75
Portland Chamber of Commerce.....	21.00
Oregon Funeral Directors' Assn.....	15.00
E. J. Chapman Co.....	12.50
Wm. Willing	42.50
	[2]
Electrical Products Corporation.....	7.46
Swift & Company.....	27.90
Portland Seed Company.....	12.00
Newman Brothers, Inc.....	24.00
May Hardware Company.....	22.03
The Swender Blue Print Co.....	15.30
National Iris Gardens.....	12.00
Pioneer Publishing Company.....	10.00
W. J. McCready Lumber Co.....	40.70
Hirsch-Weis Mfg. Co.	3.25
Journal Publishing Co.....	41.08
Total.....	\$5,288.96

4. It is apparent from the foregoing lists that Messrs. Lenske and Herbert M. Cole voted the greater number of claims over \$50.00 in amount and that Mr. Ahlgrim and his associates voted claims totalling the larger amount including claims of \$50.00 or less which may be counted in computing the amount of claims voted. (Section 55c of Bankruptcy Act).

5. Although the question was not raised before the referee, the court's attention should be called to the fact that the following claims were voted by Herbert M. Cole as attorney in fact, notwithstanding the fact that he acted as notary and took the acknowledgment of the creditor on the instrument by which he was appointed attorney in fact:

Cutler Printing Co.....	\$ 193.10
H. J. Sandberg.....	403.40
The Oregon Legionnaire.....	17.50

Powers so acknowledged have been held void. (See in re Grossman, 225 Fed. 1020, 34 ABR 32.)

Questions Presented

6. The only questions presented on review are: [3]

(1) Was the Referee in error in ruling that there was no election of a trustee by the creditors?

(2) Was the referee in error in overruling the objections of petitioners to certain claims where it appeared on the face of the claims that the proofs and powers of attorney were executed after the rendition of the jury's verdict on insolvency and before the formal entry of the order of adjudication?

(3) Was the referee in error in permitting R. N. Kavanaugh, Administrator of the Estate of J. P. Kavanaugh, deceased, to vote the claim of the estate in the sum of \$2500.00 over the objection of the petitioners that it was not properly itemized and the consideration therefor not sufficiently set forth?

With respect to the objections to the Kavanaugh claim, Mr. Lenske admitted that he knew that Judge Kavanaugh had rendered valuable services to the bankrupt some years ago but that he was of the opinion that the amount asked was too large. Mr. Kavanaugh stated that statements had been rendered to the bankrupt for this amount over a period of years and that it had not been questioned by the bankrupt. The referee ruled that he would give full faith and credit to the sworn statement contained in the claim and that Mr. Kavanaugh was entitled to vote the claim.

Papers Transmitted

Transmitted herewith are the following:

1. Petition for review.
2. All claims hereinbefore listed.

Dated at Portland, Oregon, this 11th day of July, 1941.

ESTES SNEDECOR,
Referee in Bankruptcy.

Notice of the filing of the foregoing certificate given July 12, 1941, to Reuben G. Lenske, Herbert M. Cole and Lester L. Ahlgrim, attorneys of record.

G. H. MARSH,

Clerk.

L. S. ROGERS,

Deputy.

[Endorsed]: Filed July 11, 1941. G. H. Marsh, Clerk. By L. S. Rogers, Deputy. [4]

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Judges of the District Court of the United States, for the District of Oregon.

Your petitioners, Wm. H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Company, C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Company, Cutler Printing Company, and Oregon Sign & Neon Corporation, appearing by Reuben G. Lenske and Herbert M. Cole, their attorneys, respectfully represent and petition as follows:

I.

Your petitioners in review are citizens of the United States and residents of the State of Oregon, and are creditors of the above named West Hills Memorial Park, a corporation, which was duly adjudged a bankrupt by the United States District Court for the District of Oregon on May 23, 1941.

II.

That said adjudication was based upon an involuntary petition filed by petitioners Wm. H. B. Smith, Jr., United Adjusters, Inc., and Cutler Printing Company on July 3, 1940, and that some of the other petitioners herein filed intervening petitions, all of which proceedings were prosecuted by

Reuben G. Lenske and Herbert M. Cole, attorneys, and after adjudication the above entitled court referred further proceedings to the Honorable Estes Snedecor, referee, and that the first meeting of the creditors was thereupon held before the Honorable Estes Snedecor, referee, on June 30, 1941.

III.

That petitioners were represented by attorneys Reuben G. Lenske and Herbert M. Cole at said meeting and that duly executed powers of attorney and proofs of claim [5] were presented at said meeting by petitioners; that the following duly verified claims were voted by petitioners for Linwood B. Cornell, to-wit:

H. J. Sandberg	\$ 403.40
Howard-Cooper Corporation	327.50
Shell Oil Company.....	128.75
James A. Sewell.....	101.75
Drake Lumber Company.....	346.46
C. H. Martin.....	996.00
George Teufel	57.50
Howard E. Golden.....	125.00
P. E. Golden.....	250.00
Wm. H. B Smith, Jr.....	1,200.00
L. L. Dougan.....	100.00
Warren H. Cooley.....	362.75
Oregon Securities Company.....	120.02
Cutler Printing Company.....	193.10
Oregon Sign & Neon Corporation.....	473.50

IV.

That thereupon Lester L. Ahlgrim, attorney at law, nominated C. X. Bollenback for trustee and

stated to the Honorable Estes Snedecor that Linwood B. Cornell advised him that he was unwilling to serve as such trustee.

V.

That thereupon petitioners duly nominated Herbert M. Cole as nominee for trustee.

VI.

That Lester L. Ahlgrim, attorney, presented on behalf of his nominee, C. X. Bollenbach, the following claims, to-wit:

Oregon Door Co.....	\$ 75.00
Enterprise Planing Mill Co.....	163.74
Honeyman Hardware Co.....	157.04
J. K. Gill Co.....	76.55
Oregon Brass Works.....	726.20
Credit Service Company.....	889.96
J. E. Windle.....	949.18
Will H. Masters.....	2,250.00

VII.

That petitioners objected to the voting of the claims of Oregon Door Co.; Enterprise Planing Mill Co.; Honeyman Hardware Co.; J. K. Gill Co.; and Oregon Brass Works on the ground that it appeared upon the face of said proofs and powers of attorney that they were executed prior to the adjudication of bankrupt; that said objections were overruled.

VIII.

That petitioners through their counsel objected to the claim of J. E. Windle, [6] among other reasons,

on the ground that he had been managing agent of bankrupt and petitioners objected to the claim of Will H. Masters on the ground, among other reasons, that he was attorney for bankrupt in the within proceedings; that said objections were sustained and that thereupon the Honorable Estes Snedecor, referee, stated that petitioners had a majority in number and amount of creditors voting.

IX.

That hereinabove petitioners refer to claims over \$50.00; that voting with petitioners was one claim under \$50.00 and numerous claims were voted by Lester L. Ahlgrim, attorney, which were under \$50.00, but that the amount of said claims was insufficient to make any difference at any stage of the election as to which presented the greatest total.

X.

That thereupon Lester L. Ahlgrim stated that R. N. Kavanaugh had several claims which he wished to vote and that R. N. Kavanaugh presented two claims, one by Lee F. Bellinger in the sum of \$1,855.09 and the other by R. N. Kavanaugh, administrator, in the sum of \$2,500.00; that a claim was also presented on behalf of Beasley & Stoehr in the sum of \$393.75, which said three claims were voted for C. X. Bollenback.

XI.

That petitioners objected to the claim of Lee F. Bellinger and the right of said claim to be voted

on the election of a trustee on the ground that he had been a director and officer of the bankrupt and was then and there a stockholder of bankrupt and said objection was sustained.

XII.

That petitioners objected to the voting of the claim presented by R. N. Kavanaugh, among other reasons, on the ground that said claim was not properly itemized and *tht* the consideration therefor was not sufficiently set forth.

XIII.

That said objection was overruled and that thereupon the referee declared that the petitioners had a majority in number, but that the claims presented by Lester L. Ahlgrim and voted for C. X. Bollenback represented a majority in amount [7] and that there was no election.

XIV.

That the referee thereupon appointed C. X. Bollenback trustee.

XV.

Petitioners further allege that the total amount of allowed claims voted by petitioners totaled \$5185.74 and the total amount of allowed claims voted by Lester L. Ahlgrim totaled \$4982.24, exclusive of claims under \$50.00 and that it was only as a result of a clerical error in computation that said total figures were not recognized by the Honorable Estes Snedecor, referee.

XVI.

That on June 30, 1941, the Honorable Estes Snedecor made and entered the following order:

“In the election of a trustee Mr. Ahlgrim voted the largest in amount and Mr. Lenske voted the largest in number, and the referee declared a failure to elect a trustee and appointed Clarence X. Bollenback trustee of the bankrupt's estate and fixed his bond at \$2,000.00.”

XVII.

That the Honorable Estes Snedecor, referee, erred in the following respects, to-wit:

1. In that he overruled the objections of petitioners to the aforesaid proofs of claim which, together with the powers of attorney, were executed prior to the adjudication in bankruptcy herein.

2. In that he overruled the objections of petitioners to the right of the claim of R. N. Kavanaugh, administrator, to be voted.

3. In that he ruled that there was no election of a trustee by petitioning creditors.

4. In that he failed to declare the election of Herbert M. Cole as trustee.

5. In that the referee entered the order of June 30, 1941, hereinabove set forth.

Wherefore, petitioners pray that the rulings and said order of the Honorable Estes Snedecor, referee, be reviewed and that the order appointing Clarence

X. [8] Bollenbach as trustee herein be set aside and dismissed and that an order be entered that Herbert M. Cole was elected trustee.

WILLIAM H. B. SMITH, JR.,
One of Petitioners.

REUBEN G. LENSKE,
HERBERT M. COLE,
Attorneys for Petitioners,
825 Yeon Building, Portland, Oregon.

State of Oregon,
County of Multnomah—ss.

I, Wm. H. B. Smith, Jr., being first duly sworn say that I am one of the petitioners herein, and that the foregoing petition is true as I verily believe.

WILLIAM H. B. SMITH, JR.

Subscribed and sworn to before me this 9th day of July, 1941.

[Seal]

R. G. LENSKE,
Notary Public for Oregon.

My Commission Expires: July 1, 1945.

Service Accepted July 9, 1941.

L. L. AHLGRIM
By E. A. BOYRIE

Copy served on C. X. Bollenbach by leaving same in his office July 9, 1941.

ROSS D. COHEN

[Endorsed]: Filed July 9, 1941. Estes Snedecor, Referee in Bankruptcy. Filed July 11, 1941. G. H. Marsh, Clerk. By L. S. Rogers, Deputy. [9]

In the District Court of the United States
For the District of Oregon,Division
No. B25045

In the Matter of WEST HILLS MEMORIAL
PARK, a corporation,

Bankrupt.

PROOF OF CLAIM

of

R. N. KAVANAUGH, Administrator of the Estate
of John P. Kavanaugh, Deceased, Creditor

State of Oregon,
County of Multnomah—ss.

At Portland, in the County of Multnomah and State of Oregon, came R. N. Kavanaugh, Administrator, of Portland in said County and State, and made oath and says:

That he hereinafter designates himself as claimant.

That said claimant is doing business at Portland, in the State of Oregon, and that affiant is duly authorized to make this proof that no usury is involved; and that said bankrupt was, at and before the filing of the petition in bankruptcy in this case, and still is, justly and truly indebted to the said claimant in the sum of \$2,500.00. That the consideration of said debt is as follows: Legal services rendered: Between May 1, 1935 and October 1, 1938.

No note has been received for said account, and no judgment has been rendered thereon: *that no part of said debt has been paid and that there are no set-offs or counter-claims to the same, except as set forth in the statement hereto attached, marked "A" and made part hereof. For which said sum, or any part thereof, this deponent says that said claimant has not, nor has any person for or on behalf of said claimant, or to this deponent's knowledge or belief, for said claimant's use had or received any manner of satisfaction or security whatsoever, except—None.

R. N. KAVANAUGH,

Administrator of the Estate of
John P. Kavanaugh, deceased (L. S.)

Subscribed and sworn to before me, this 30th day of June, 1941.

[Seal]

L. L. AHLGRIM,
Notary Public for Oregon.

My commission expires 9/14/41.

Lee F. Bellinger or the attorneys presenting this claim for allowance, are hereby constituted and appointed Attorneys-in-Fact for the claimant herein, with full authority to represent the claimant at all meetings of creditors, vote for trustee, vote or act upon any question submitted to the creditors, receive all notices and dividends or sums paid on

composition, and do and perform all things the claimant might legally do.

R. N. KAVANAUGH,

Administrator of the Estate of
John P. Kavanaugh, deceased
(L. S.)

State of Oregon,

County of Multnomah—ss.

On this 30th day of June, nineteen hundred and forty-one, before me personally came R. N. Kavanaugh, Administrator, to me personally known, who being by me duly sworn and known to me to be the same person described in and who executed the within instrument, and he acknowledged to me that he executed same. That he is the administrator of the estate of John P. Kavanaugh, deceased.

[Seal]

L. L. AHLGRIM,

Notary Public for Oregon.

My commission expires 9/14/41.

West Hills Memorial Park, a corporation
to

Kavanaugh & Kavanaugh, Dr.

Legal services rendered between May 1,

1935 and October 1, 1938\$2,500.00

[Endorsed]: Filed Jul. 11, 1941. G. H. Marsh,
Clerk.

[Title of District Court and Cause.]

OPINION

James Alger Fee, District Judge:

This proceeding is brought for the review of the rulings of Honorable Estes Snedecor, Referee in Bankruptcy, at the meeting of creditors for the election of trustee. Group One of creditors voted the greater number of claims over \$50.00, while Group Two voted the larger amount including claims of \$50.00 or less. The Referee summarily examined on objection a claim of J. P. Kavanaugh by R. N. Kavanaugh, Administrator, for services of attorney rendered to the bankrupt. This claim is not itemized. The attorney for Group One admitted that he knew valuable services to the bankrupt had been rendered. The holder of the claim was present and showed that statements had been rendered to the bankrupt for the same amount for a period of years and that the amount stated had not been questioned. Upon this basis, the Referee permitted filing and voting of the claim. The Referee also permitted over objection the voting by Group Two of certain claims where it appeared on the face thereof that the proofs and powers of attorney were executed after the rendition of the jury's verdict of insolvency and before the formal entry of adjudication.

There were certain claims presented and voted by Group One in which the attorney in fact had acted as notary [10] and taken the acknowledgment of the creditor on the instrument by which he was ap-

pointed, but specific objection was not made thereto.

Finally, based upon the situation above outlined, the Referee reserved his ruling until all claims had been considered and all creditors with votable claims had been given an opportunity to vote.

Finally, the Referee declared a failure to elect a trustee and independently made an appointment.

The allowance of the Kavanaugh claim will be considered first. It has been announced that a claim must be itemized in accordance with the statute,¹ and this rule has been applied to attorney fees.² Such rulings usually have been in affirmance of the Referee when he has disallowed a claim,³ and the claimant has refused to support it by evidence. However, the Referee has discretion as to how much argument or testimony he will hear in support or opposition to a claim before election. Usually, he should hear the matter in a summary manner and determine whether the claim was probably well founded.⁴ Here the certificate shows that the attack was made on the amount of the claim and not on its validity. Besides, the circumstances indicated that this constituted an account stated under the Oregon

1. Section 57a Bankruptcy Act, 11 USCA, §93(a) General Order 21, 11 USCA, following Section 53.

2. In re Hudson Porcelain Co., 225 F. 325, 327.

3. Hutson vs. Coffman, 100 F.(2d) 640, 642; In re Hudson Porcelain Co., *supra*, 326.

4. See in re Hartman-Blanchard Co., Inc., 278 F. 747, 748.

law.⁵ Where the claimant is present at the [11] meeting to elect a trustee and prepared to support the claim, it is not error for the Referee to allow it for voting purposes,⁶ even if the original proof be somewhat informal. Furthermore, the record on the trial of the insolvency petition will show that the petitioners introduced testimony as to the validity and amount of this claim in order to show insolvency. This fact does not create an estoppel, because the trustee is bound to scrutinize the claim until final liquidation if he discover facts which show improper allowance,⁷ but the Referee could consider such facts to determine whether the amount of the claim was proper for allowances.

There is no authority indicating that a claim filed after a finding of insolvency but before entry of the order of adjudication is invalid. The adjudication when made relates back to the filing of the petition and these claims were otherwise proper.

Finally, there was a contest, in which the one side had more claims over fifty dollars but the other had a greater amount of all claims. The rulings of the Referee just considered entered into this result. The Referee declared the creditors had failed to elect

5. *Steinmetz vs. Grennon*, 106 Oregon. 625, 634.

6. *In re Louis Elting, Inc.*, 4 F. Supp. 732, 736, Item 6.

7. *In re J. A. M. A. Realty Corporation*, 92 F.(2d) 3, 8; *Ott vs. Thurston, et al.*, 76 F.(2d), 368, 369.

and appointed a trustee. This action was valid and entirely proper under the circumstances.⁸

The court affirms the action in all particulars.

[Endorsed]: Filed September 29, 1941. G. H. Marsh, Clerk. By L. S. Rogers, Deputy. [12]

[Title of District Court and Cause.]

ORDER AFFIRMING REFEREE'S
APPOINTMENT OF TRUSTEE

The above entitled matter having come on to be regularly heard upon petition of certain creditors for a review of the Referee's order appointing Clarence X. Bollenback trustee of the estate herein and certificate of proceedings had before the referee herein having been duly filed with this court by the Honorable Estes Snedecor, Referee in Bankruptcy, objecting creditors appearing by Reuben Lenske, of their attorneys, and the trustee appearing by his attorneys, Moe M. Tonkon, and the court having heard arguments of respective counsel and having taken the matter under advisement and having rendered its oral opinion, and now being fully advised in the premises,

It Is Hereby Ordered that the order of Estes Snedecor, Referee, appointing Clarence X. Bollen-

8. In re Hartman-Blanchard, *supra*; In re Louis Elting, Inc., *supra*.

back trustee herein, be and the same is hereby affirmed in all particulars.

JAMES ALGER FEE

District Judge

Dated this 30 day of September, 1941.

[Endorsed]: Filed September 30, 1941. G. H. Marsh, Clerk, By L. S. Rogers, Deputy. [13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Wm. H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Company, C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Company, Cutler Printing Company, and Oregon Sign & Neon Corporation, hereby appeal to the Circuit Court of Appeals for the ninth circuit from the order entered in this court on September 30, 1941 affirming the referee's appointment of Clarence X. Bollenbach as trustee of the above entitled bankruptcy estate.

REUBEN G. LENSKE,

Attorney for Appellants

above named

825 Yeon Building

Portland, Oregon. [14]

AFFIDAVIT

United States of America,
State of Oregon,
County of Multnomah—ss.

I, Sidney I. Spiegel, being first duly sworn upon oath depose and say that I am over the age of 21 and a citizen of the within county and state; that on October 29, 1941 I served the attached Notice of Appeal upon Lester L. Ahlgrim, one of the attorneys for adverse creditors in said proceeding, by leaving a duly certified copy thereof with said attorney's secretary in his office in the Pittock Block at Portland, Oregon on October 29, 1941; and I likewise served Clarence X. Bollenback on the said date by leaving a duly certified copy thereof with his secretary in his office at the Board of Trade Building in Portland, Oregon.

SIDNEY I. SPIEGEL

Subscribed and sworn to before me this 29th day of October, 1941.

[Seal]

C. G. HOLLAND

Notary Public for Oregon

My commission expires 4/6/45

[Endorsed]: Filed October 29, 1941. G. H. Marsh,
Clerk, By L. S. Rogers, Deputy. [15]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY IN THE ABOVE ENTITLED APPEAL.

I.

The referee erred in permitting the claim of R. N. Kavanaugh, administrator, to be voted.

II.

The referee erred in permitting claims to be voted that were executed prior to adjudication.

III.

The referee erred in declaring that there was no election of a trustee.

IV.

The referee erred in failing to hold that Herbert M. Cole was elected trustee.

V.

The referee erred in entering the following order on June 30, 1941:

“In the election of a trustee Mr. Ahlgrim voted the largest in amount and Mr. Lenske voted the largest in number, and the referee declared a failure to elect a trustee and appointed Clarence S. Bollenbach trustee of the bankrupt’s estate and fixed his bond at \$2,000.00.”

VI.

The District Court erred in confirming the order and rulings of the referee hereinabove set forth.

REUBEN G. LENSKE

Attorney for Wm. H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Co., C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Co., Cutler Printing Co., and Oregon Sign & Neon Corp., Appellants.

Due and legal service accepted this 26th day of November, 1941.

MOE M. TONKON

Attorney for Trustee

[Endorsed]: Filed November 26, 1941. G. H. Marsh, Clerk, By L. S. Rogers, Deputy. [20]

United States of America
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify: That the foregoing pages numbered from 1 to 31, inclusive, constitute the transcript of record on appeal from an order of said court in a certain bankruptcy case, No. B25045, in the Matter of West Hills Memorial Park, a corporation, Bank-

rupt, William H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Company, C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Company, Cutler Printing Company, and Oregon Sign & Neon Corporation, petitioning creditors, in which the said William H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Company, C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Company, Cutler Printing Company, and Oregon Sign & Neon Corporation, petitioning creditors, are appellants, and Clarence X. Bollenbach, Trustee of the Estate of the above named bankrupt, is appellee; that said transcript has been prepared by me in accordance with the praecipes filed by said appellants and said appellee and in accordance with the rules of court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true, and correct transcript of the record and proceedings had in said court in said cause, as the same appears of record and on file at my office and in my custody, prepared in accordance with the said praecipe and rules of court.

I further certify that, by direction of the court, I am transmitting with said transcript of record on appeal the original proofs of claims designated

by said order to be transmitted to the Court of Appeals.

I further certify that the cost of the foregoing transcript is \$4.05 and that same has been paid by said appellants.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 22d day of January, 1942.

[Seal] G. H. MARSH,
Clerk. [32]

[Endorsed]: No. 10030. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of West Hills Memorial Park, a corporation, Bankrupt, Wm. H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Company, C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Company, Cutler Printing Company and Oregon Sign & Neon Corporation, Appellants, vs. Clarence X. Bollenbach, Trustee of the Estate of West Hills Memorial Park, a corporation, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed January 26, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit,

No. 10030

In the Matter of WEST HILLS MEMORIAL
PARK, a corporation,

Bankrupt.

DESIGNATION OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY

Come now appellants and pursuant to Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby designate the following points on which appellants intend to rely in the within appeal.

Major Points:

I.

The referee erred in failing to declare the election of Herbert M. Cole as trustee of the above entitled bankruptcy estate and he erred in declaring that there was no election and in appointing C. X. Bollenbach as trustee.

II.

The District Court erred in affirming the order of the referee.

Minor Points:

I.

The referee erred in permitting the Kavanaugh claim to be voted in the election of the trustee.

(a) Where a claim is objected to at the first meeting of creditors the referee should either postpone the meeting and hear objections to the claim or have a summary hearing then and there and determine the validity of the claim.

(1) The referee did neither in this instance.

(b) The Kavanaugh claim did not have an itemized statement showing the services rendered and the consideration upon which the claim was based and, therefore, was not entitled to be voted.

(c) No claim was made by said claimant that his claim was based upon an account stated and it was error for the referee to consider the claim as an account stated.

(d) A claim based upon an account stated is not relieved of the requirement that the Proof of Claim must show in reasonable detail the consideration upon which the account stated is based.

(e) Where a claimant does not present a sufficient Proof of Claim but is present at the first meeting of creditors in a bankruptcy proceeding, he must offer himself for examination under oath upon said claim before being allowed to vote thereon.

(f) Proof of claim in bankruptcy constitutes not only a pleading but also prima facie evidence and should be complete in and of itself in order to entitle the claimant to vote and participate in the estate.

(g) Admissions by counsel for objecting creditors or even belief by the referee that a claim is

valid does not make up for the failure of the Proof of Claim to be sufficient for its allowance as a claim.

II.

Proofs of Claim and Powers of Attorney executed prior to an adjudication and after trial before a jury on some of the issues may not be voted at the election of a trustee.

REUBEN G. LENSKE,

Attorney for Appellants Wm. H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Company, C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Company, Cutler Printing Company, and Oregon Sign & Neon Corporation.

Service accepted this 3rd day of February, 1942.

MOE M. TONKON

Attorney for Appellee.

[Endorsed]: Filed Feb. 4, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ITEMS TO BE PRINTED

1. Petition for Review.
2. Certificate of Referee on Review.
3. Opinion of District Court.
4. Order of District Court affirming Referee.
5. Kavanaugh Proof of Claim.
6. Notice of Appeal.
7. Designation of Points Upon Which Appellants Intend to Rely.

REUBEN G. LENSKE

Attorney for Appellants

Service accepted this 3rd day of February, 1942.

MOE M. TONKON

Attorney for Appellee

[Endorsed]: Filed Feb. 4, 1942. Paul P. O'Brien,
Clerk.